

FILED

JUN 16 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

RYOJI NISHINO,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 05-71043

Agency No. A77-357-928

MEMORANDUM^{*}

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted June 12, 2006^{**}

Before: KLEINFELD, PAEZ, and BERZON, Circuit Judges.

Ryoji Nishino, a native and citizen of Japan, petitions for review of an order of the Board of Immigration Appeals (“BIA”) dismissing as untimely his appeal from an immigration judge’s removal order. We have jurisdiction pursuant to 8 U.S.C. § 1252, and deny the petition for review.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Nishino's opening brief states that he "caused his notice of appeal [to the BIA] to be sent by Express U.S. Mail Overnight service on January 8, 2005." There is no evidence in the record to support this statement. *See Gafoor v. INS*, 231 F.3d 645, 655 (9th Cir. 2000) ("[O]ur review of BIA decisions is generally limited to the record."). Nishino nonetheless contends that the BIA's application of 8 C.F.R. § 1003.38 to dismiss his appeal as untimely violated due process. Reviewing de novo, *see Fernandez v. Gonzales*, 439 F.3d 592, 603 (9th Cir. 2006), we disagree. Unlike the petitioner in *Gonzalez-Julio v. INS*, 34 F.3d 820 (9th Cir. 1994), Nishino has not demonstrated that the applicable regulation "results in uncertainty and arbitrary results." *Id.* at 825.

PETITION FOR REVIEW DENIED.